that the second charge had thereby lost the security is entirely without merit in the face of the terms of s 268 of the National Land Code which provides for the payment of moneys realized from a sale pursuant to a foreclosure action, inter alia, in respect of charges subsequent to the charge in respect of which there was foreclosure.

The application was dismissed with costs.

Application dismissed.

Solicitors: *Lim Kean Siew & Co; Shook Lin & Bok.*

Reported by *Ng Sheau Jiuan*

Public Prosecutor v Chan Kam Leong

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY CRIMINAL REVISION NO 53-19-86
ZAKARIA YATIM J
5 NOVEMBER 1988

Criminal Procedure – Accused detained and urine tests carried out under Drug Dependants (Treatment and Rehabilitation) Act 1983 – Whether Public Prosecutor can subsequently charge accused under Dangerous Drugs Act 1952 – Criminal Procedure Code (FMS Cap 6), s 376

Criminal Procedure – Magistrate not making orders after receiving accused's urine test conducted under Drug Dependants (Treatment and Rehabilitation) Act 1983 – Public Prosecutor subsequently charging accused under Dangerous Drugs Act 1952 – Whether same magistrate can sit to decide the charge

Criminal Law – Offence of self-administration of morphine under s 15(a) of the Dangerous Drugs Act 1952 – Elements of proof – Mere existence of drugs as confirmed in urine test not sufficient evidence for conviction – Dangerous Drugs Act 1952, s 15(a)

The accused was charged and convicted in the Magistrate's Court of an offence under s 15(a) of the Dangerous Drugs Act 1952, viz administering to himself a dangerous drug (morphine). The learned magistrate referred the following three questions to the High Court for its consideration:

(i) Whether a person detained under ss 3, 4 and 6 of Part 2 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 and where tests confirmed by a medical practitioner show that he is a drug dependant can be charged under s 15(a) of the Dangerous Drugs Act 1952 before production of the said persons before a magistrate as required under s 6(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983.

(ii) If the answer is in the affirmative: whether mere existence of drugs as confirmed in the urine test by a medical practitioner under s 6 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 is enough ground for charging or convicting a person for self-administration of a dangerous drug under s 15(a) of the Dangerous Drugs Act 1952.

(iii) If the answer is in the negative and the magistrate, after having regard to s 6(4), decides not to make the relevant orders under s 6(1)(a) or (b), and if the Public Prosecutor decides to charge the dependant under s 15(a) of the Dangerous Drugs Act 1952, whether the same magistrate can sit to decide the charge against the accused as the magistrate had already regard to the character and antecedents of the accused under s 6(4).

Held:

(1) Even if the accused was arrested under s 3 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 and the urine tests carried out under that Act showed that he was a drug dependant, this does not prevent the Public Prosecutor from charging the accused under s 15(a) of the Dangerous Drugs Act 1952. This is because under s 376 of the Criminal Procedure Code, the Public Prosecutor has the control and direction of all criminal prosecutions and proceedings. He has the power, exercisable at his discretion, to institute or conduct any proceedings for an offence, other than proceedings before a Syariah Court, Native Court or a court martial. The answer to the first question is therefore in the affirmative.

(2) In order to prove that a person is guilty of an offence under s 15(a) of the Dangerous Drugs Act 1952, the prosecution must prove: (i) the accused administered the drugs to himself, or the accused suffered another person, contrary to s 14 of the Act, to administer to him the dangerous drugs, and (ii) that the urine of the accused is clinically tested and found to contain the drugs. It is clear that the mere existence of drugs as confirmed in the urine test by a medical practitioner is not sufficient evidence to convict a person under the section.

(3) With regard to the third question, the answer is in the affirmative. However, it is desirable that another magistrate hears the case.

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 376
Dangerous Drugs Act 1952 s 15(a)
Drug Dependants (Treatment and Rehabilitation) Act 1983 ss 3, 6
Federal Constitution art 145(3)

KC Cheah for the accused.
Ahmad Rosli Mohd Sham (Deputy Public Prosecutor) for the Public Prosecutor.

Cur Adv Vult

Zakaria Yatim J: This case was referred by the learned magistrate to this court asking this court to exercise its power of revision in respect of a proceeding against an accused person under s 15(a) of the Dangerous Drugs Act 1952. In his application for revision he stated the following three questions for the consideration of the court:

(1) whether a person detained under ss 3, 4 and 6 of Part 2 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 and where tests confirmed by a medical practitioner show that he is a drug dependant can be charged under s 15(a) of the Dangerous Drugs Act 1952 before production of the said person

before a magistrate as required under s 6(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983;

(2) if the answer is in the affirmative, whether mere existence of drugs as confirmed in the urine test by a medical practitioner under s 6 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 is enough grounds for charging or convicting a person for self-administration of a dangerous drug under s 15(a) of the Dangerous Drugs Act 1952. The burden of proof apparently is on the prosecution and there are no presumptions against the accused under the said Act. Self-administration is not defined in the Act;

(3) if the answer is in the negative and the magistrate, after having regard to s 6(4), decides not to make the relevant orders under s 6(1)(a) or (b); and if the Public Prosecutor decides to charge the dependant under s 15(a) of the Dangerous Drugs Act 1952; whether the same magistrate can sit to decide the charge against the accused as the magistrate had already regard to the character and antecedents of the accused under s 6(4).

The facts of the case are briefly as follows. On 7 January 1986, at about 11.30 am, the complainant, DPC Mohd Zaki together with two other detective constables, arrested the accused at Taman Maju Jaya, Ampang on the ground that the accused was suspected to be a drug dependant (penagih dadah). A sample of his urine was taken and sent to the General Hospital, Kuala Lumpur to ascertain whether the accused was a drug dependant. On 12 January 1986, the police received the result of the test, which stated that the sample of the accused's urine contained morphine. The fact that morphine was found in his urine shows that he must have administered the drug to himself.

The accused was subsequently charged in the Magistrate's Court with an offence punishable under s 15(a) of the Dangerous Drugs Act 1952. The offence was for administering to himself a dangerous drug, namely, morphine. The accused pleaded guilty to the charge. The learned magistrate convicted him and sentenced him to a fine of $800 in default eight months' imprisonment and two years' drug supervision.

I find nothing in the record to show that the accused was arrested under the Drug Dependants (Treatment and Rehabilitation) Act 1983, although the facts of the case do indicate that he was arrested under s 3(1) of that Act. His urine test was completed by the General Hospital on 10 January 1986, that is, three days after his arrest. The police received the report on 12 January 1986 and served it on the accused on 21 January 1986. On that date the accused was charged in the Magistrate's Court under s 15(a) of the Dangerous Drugs Act 1952. He was released on bail of $2,000 and the date of hearing was fixed on 10 April 1986. His case was finally fixed for hearing on 14 July 1986 and on that date he pleaded guilty.

It appears from the facts of this case that the prosecution had decided to charge the accused under s 15(a) from the beginning. Even if the accused was arrested under s 3 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 and the urine test was carried out under that Act, the Public Prosecutor can still charge the accused under s 15(a). This is because, under s 376 of the Criminal Procedure Code (FMS Cap 6), the Public Prosecutor has the control and direction of all criminal prosecutions and proceedings. He has the power, exercisable at his discretion to institute or conduct any proceedings for an offence, other than proceedings before a Syariah Court, Native Court or a court martial (see art 145(3) of the Federal Constitution). In the instant case even though tests carried out by a medical practitioner show that the accused was a drug dependant, this does not prevent the Public Prosecutor from charging the accused under s 15(a) of the Dangerous Drugs Act. The answer to the first question is therefore in the affirmative.

Since the answer to the first question is in the affirmative, I shall next deal with the second question. The question asked by the learned magistrate is whether the existence of a drug in the urine of the accused is sufficient ground for convicting him on a charge of self-administering the said drug under s 15(a) of the Dangerous Drugs Act 1952. Section 15(a) states:

> Any person who –
> (a) administers to himself or suffers any other person, contrary to the provisions of section 14, to administer to him any dangerous drug specified in Parts III & IV of the First Schedule ... shall be guilty of an offence against this Act and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years.

From the provision quoted above it is clear that the mere existence of drugs as confirmed in the urine test by a medical practitioner is not sufficient evidence to convict a person under the section.

In order to prove that a person is guilty of an offence under s 15(a), the prosecution must prove (1) the accused administers the drugs to himself; or the accused suffers another person, contrary to s 14 of the Act, to administer to him the dangerous drugs; and (2) that the urine of the accused is clinically tested and found to contain the drugs. This answers the second question asked by the learned magistrate.

In the present case the charge was read to the accused and the facts were stated to him. He understood

the charge and pleaded guilty to the charge. He also admitted the facts of the case without any qualification. Both the charge and the facts of the case state that the accused administered the drug to himself. In the circumstances, I find that his conviction and sentence are lawful.

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Finally with regard to the third question, the answer is in the affirmative. However, it is desirable that another magistrate hears the case.

Solicitor: *KC Cheah & Co.*

Reported by *Ng Sheau Jiuan*